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No. 606

In the Supreme Court

of the United States

OCTOBER TERM OF 1958

HELEN A. DAVENPORT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

REUBEN G. LENSKE,
Lawyers Building,
Portland, Oregon,
Attorney for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-59

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ARGUMENT

It is not petitioner's theory that is the novelty of this cause. The novelty is the mechanics of this indictment. It crowns a series of jointly charged substantive offenses with a conspiracy count whose material allegations consist of the allegations of the substantive offense incorporated by reference. Under this circumstance it then adds to the conspiracy count two "accused" neither accused of, nor mentioned in, the allegations of fact of the substantive counts upon which the conspiracy

count is purportedly based. As the Government's Brief in Opposition reflects, the efforts of counsel have so far failed to reveal any reported prior observations upon an attempt to indict in this fashion.

The fashion in which petitioner's co-defendants are indicted for conspiracy by this indictment has been approved by the Courts solely upon the theory that an inference of an agreement to commit a substantive offense is inherent in allegations and proof of its joint commission.

Upon what new and novel theory has petitioner been indicted?

Whatever it is, the practical difficulty that it faces is that the allegations of the first substantive count are not laid directly against petitioner. Only one of three alternative answers are possible in this situation:

Either the failure to charge petitioner directly with these allegations means nothing because generally speaking these allegations are not such allegations of fact as are material to a conspiracy count (which is not so); or it means nothing because although they are material allegations the Government can allege and prove some part, if not all, of an accused's ultimate personal participation in a "conspiracy" directly through such allegations and proof of the acts and intent of others (which ought not to be possible); or it means a great deal in that these allegations of fact are material allegations to this conspiracy count and as such must be charged directly as the act and intent of anyone to be found guilty of the latter (which is the true answer).

Petitioner certainly does challenge the sufficiency of the evidence against her. Reference to evidence that petitioner "participated in the conspiracy" must necessarily be a reference to evidence purportedly showing that she knowingly participated in the comission of a substantive offense from which such an inference can be drawn.

Under what allegations of fact charged against her, and against which she had opportunity to defend, could evidence of her participation in the substantive offense be adduced?

If this conspiracy count were in any way valid against petitioner, it is patent that it would limit the evidence necessary to sustain her conviction to direct evidence of an express agreement upon her part (of what nature it is impossible to say), as distinct from the evidence of participation in the substantive offense that could be adduced against her co-defendants under the allegations of the first substantive count incorporated therein.

Upon what basis can a citizen be imprisoned without an indictment informing them not only of the nature crime of which they are accused, but of the particular acts that *they* committed that are the *cause* of the accusation? Certainly not upon the Government's novel theory that a fataly defective indictment is no impediment to conviction if the evidence adduced at a trial is sufficient to have supported a proper indictment—if one had been made.

In order for this indictment to actually charge petitioner with the crime the Government thinks it charges against her, and in order for her conviction to be sustained under the proof adduced, the allegations against petitioner must be precisely the same as those made against her co-defendants. She must be charged with acts showing an intent to commit the substantive offense with others so as to permit evidence being adduced from which an inference can be drawn of her participation in an agreement with them to commit that offense. Proof that she has not been properly charged is as simple as pointing out that proof of her guilt of conspiracy depends upon the sufficiency of the evidence to prove the truth of the allegations of fact of the first substantive count against those charged therein.

Just how is petitioner expected to go about proving her co-defendants innocent of the issues of fact made against them in the first substantive count?

The Government's Brief in Opposition speaks of the conspiracy count incorporating by reference the "scheme" set forth in the substantive count as if a "scheme" has a life of its own separate from the acts and intent of those who have conceived it and by their acts have carried it into effect. The conspiracy count does not incorporate an amorphous "scheme". It incorporates allegations of fact of act and intent upon the part of those accused in the first substantive count, which, when proven, can establish nothing more than that those defendants intended such a scheme as it is alleged was made manifest by their actions.

Petitioner's conviction can only be upheld by finding against her upon the issues of fact made up by the first substantive count. By what necromancy does the conspiracy count turn these allegations of fact against her co-defendants into issues of fact as to her?

Petitioner sees nothing anomalous in her contention that allegations of fact of which she is not accused, and which do not mention her in their body, make up no issue of fact as to her. She sees nothing anomalous in her contention that the accusation of conspiracy can work no magic upon such allegations.

She sees nothing anomalous in her contention that the acts and intent set forth in the first paragraph of the first substantive count, being material allegations to the personal guilt of one accused of conspiracy, the indictment should have been so constructed as to make these allegations of act and intent personal to each defendant accused in that count.

Perhaps petitioner is a poor spokesman for what is wrong with this indictment and the total process by which her conviction was obtained. If so, then let the facts speak for themselves as to the results that will obtain if certiorari is not granted.

Past definitions of the crime of conspiracy will be swept away. Conspiracy will not be an accused's agreement to participate in a substantive offense; it will not be the agreement to be inferred from such participation. The accused "participates in the conspiracy," in the "scheme," which will not necessarily be something coincident with acts and intent of participation in the sub-

stantive offense at all, for "conspiracy" will be more of a "separate and distinct crime" than that, whatever that will mean.

The zealous prosecutor will be able to indict two or three for the commission of a substantive offense, and add a dozen in a conspiracy count charged with "conspiracy" to commit their crime, incorporated by reference. Once the guilt of those accused of the substantive count has been established, what "conspirators," if any, ought to be imprisoned in view of the circumstances revealed as surrounding their commission of the substantive offense, will be within the sound discretion of the jury.

As to rigors of proof—there will be none. The mere "conspirator" can offer no objection from start to finish of the prosecutor's case in chief. No more nonsense about prior proof of the existence of a "conspiracy." No more concern over examining the sufficiency or insufficiency of the evidence to warrant submission of the crime of "conspiracy" as to each accused.

Consider this indictment: The matter can be cut short to a simple formula. The Courts will pronounce that during its case in chief, the prosecution is obviously proving only the allegations of the substantive offense against those accused thereof as they appear in the original instance (and/or as incorporated in the conspiracy count). This is, and can be, of no concern to the "conspirator." His part in the proceedings can properly be delayed until the prosecution rests, for obviously any question as to the existence of a "conspiracy" can and

should rightfully be reserved until the Government has had the opportunity to conclude its efforts to prove the same.

It is when the prosecution rests that "conspirators" will have their opportunity to be heard. The question that they can then argue is the insufficiency of the evidence to sustain the allegations of the substantive offense as made against those accused thereof as they appear in the initial instance (and/or as incorporated into the conspiracy count). If the evidence is found sufficient to sustain the allegations of the substantive offense, then no matter with what equivalence it may touch upon any of the alleged "conspirators," (and it can touch upon them in no other fashion; after all they are not directly charged with the allegations of the substantive offense, and therefore the evidence has not had the direct object of proving them guilty thereof; to the contrary, it has necessarily raised a negative inference as to their lack of guilt thereof by being aimed at others) they will then be permitted to go forward and by testimony and argument plead with the jury to "acquit" them.

About all of the argument that can be exhibited in favor of this indictment is that the people can trust prosecuting officials to "administer" the law of conspiracy in a just, fair and impartial manner!

CONCLUSION

There was received in evidence (Def. Davenport Ex. 1) a letter from the Honorable Douglas McKay, a resident of the State of Oregon and then Secretary of the Interior for the United States, dated February 1, 1955 and addressed to petitioner, reading as follows:

" THE SECRETARY OF THE INTERIOR
WASHINGTON

FEB - 1 1955

Air mail

Dear Mrs. Davenport:

I was very pleased to note in a bulletin of the Portland Chamber of Commerce that you had been honored by being named "Woman of the Year" at a joint meeting of the Women's Forum and the Chamber of Commerce.

It is very fitting that you should be recognized for your great contribution in the citizenship program in Portland, as well as in so many community activities. The contribution that you have made to the progress and welfare of your city is well known to all of us and I join your many friends in rejoicing that you have been chosen for this special honor.

With kindest personal regards, I am

Cordially yours,

/s/ DOUGLAS MCKAY
Secretary of the Interior

Mrs. Lee Davenport
2051 Southeast Hawthorne Blvd.
Portland 15, Oregon"

Petitioner was condemned if she protested and condemned if she did not.

The Trial Court in its instructions was constrained to instruct that a defendant:

> " . . . may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members." (Tr. 1778)

It is as contrary to reason now as it was in the 17th century for a woman of petitioner's age to change the character of a lifetime overnight for the purpose of gratifying a malevolent whim. The jury was charged with emotion over the enormity of the offense committed by those accused of the substantive counts when it returned this verdict against her.

It was a pseudo-legal procedure that robbed petitioner of any forthright defense for the Government to totally charge against others sole criminal responsibility for all wrong doing involved in the original instance, and to then follow this by leveling an accusation of "conspiracy" upon that account against petitioner.

Certiorari should be granted.

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Petitioner.